

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIE C. HOWARD and U.S. POSTAL SERVICE,  
POST OFFICE, Trenton, NJ

*Docket No. 03-911; Submitted on the Record;  
Issued July 18, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant has more than a 13 percent impairment of his left lower extremity for which he has received a schedule award.

On July 29, 1994 appellant, then a 36-year-old letter carrier, filed a claim for traumatic injury, alleging that he twisted his left knee in the performance of duty. The Office of Workers' Compensation Programs accepted a July 29, 1994 left knee strain and torn medial meniscus and two subsequent arthroscopic surgical procedures performed on September 29, 1994 and June 10, 1997.

On October 15, 1994 appellant filed a claim for a schedule award. On August 1, 1996 the Office awarded appellant a schedule award for a 13 percent impairment of the left lower extremity.<sup>1</sup>

On November 14, 2000 appellant filed a claim, Form CA-7, for an increased schedule award. In support of his claim, appellant submitted a November 2, 2000 report from Dr. David Weiss, his treating Board-certified orthopedic surgeon. In his report, Dr. Weiss concluded that, pursuant to the fourth edition of the American Medical Association, *Guides to the Evaluation of*

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<sup>1</sup> In a subsequent decision dated December 22, 1998, the Office found that appellant had no loss of wage-earning capacity, based on his reemployment as a modified clerk and terminated appellant's wage-loss compensation benefits. Appellant requested an oral hearing, which was denied as untimely by decision dated February 10, 1999. Appellant requested reconsideration, and in a decision dated March 26, 1999, the Office declined to modify the prior decision. Subsequently, appellant submitted additional medical evidence together with a claim for a recurrence of disability and a request for an increased schedule award. In a decision dated May 5, 1999, the Office denied appellant's claim for an increased award. In a decision dated June 14, 1999, the Office denied appellant's claim for a recurrence of disability. Appellant requested an oral hearing on the issue of the schedule award, which was denied by the Office on August 26, 1999 as untimely filed. These previous decisions are not within the jurisdiction of the Board, as they were not issued within one year prior to appellant's February 26, 2003 appeal. *Algimantas Bumelis*, 48 ECAB 679 (1997).

*Permanent Impairment*, appellant had a 34 percent permanent impairment of his left lower extremity due to weakness, pain and crepitus.

At the request of the Office, Dr. Weiss' report was reviewed by an Office medical adviser. In a report dated March 15, 2001, the Office medical adviser concluded that, pursuant to the fourth edition of the A.M.A., *Guides*, appellant had no more than a two percent impairment of his left lower extremity.

The Office found that there was a conflict of medical opinion between Dr. Weiss and the Office medical adviser, and on May 23, 2001 referred appellant, the case record and a statement of accepted facts to Dr. Robert Dennis, a Board-certified orthopedic surgeon, to resolve the conflict. In a report dated June 11, 2001, Dr. Dennis extensively described appellant's complaints and his findings on physical examination and concluded that, pursuant to the fifth edition of the A.M.A., *Guides*, which became effective on February 1, 2001, appellant had a seven percent impairment of the whole body.

At the request of the Office, an Office medical adviser converted Dr. Dennis' whole body impairment ratings to left lower extremity impairment ratings and concluded that, pursuant to the fifth edition of the A.M.A., *Guides*, appellant had a combined left lower extremity impairment of eight percent.

By decision dated July 20, 2001, the Office awarded appellant a schedule award for an eight percent permanent impairment of his left lower extremity.<sup>2</sup>

By letter dated July 31, 2001, appellant requested an oral hearing before an Office representative.

In a decision dated January 23, 2002, an Office hearing representative found that the case was not is posture for an oral hearing. The hearing representative found that, as both Dr. Weiss and the Office medical adviser, who created the original conflict in medical opinion, had based their calculations of impairment on the fourth edition of the A.M.A., *Guides*, Dr. Dennis, the impartial medical examiner should be directed to recalculate his impairment ratings also using the fourth edition of the A.M.A., *Guides*.<sup>3</sup> The hearing representative also noted that the Office had erred in allowing Dr. Dennis' findings to be reviewed by the same Office medical adviser who had formed the conflict with Dr. Weiss. Therefore, the Office hearing representative

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<sup>2</sup> This award was issued in error, as appellant had already received an award for a 13 percent permanent impairment of his left lower extremity, which is greater than the degree of impairment found by Dr. Dennis. On April 22, 2002 the Office issued a preliminary overpayment determination, notifying appellant that he had been erroneously paid for an additional eight percent permanent impairment. By letter dated April 25, 2002, appellant requested an oral hearing on the issue of the overpayment. The record before the Board does not contain a final decision on the overpayment issue.

<sup>3</sup> The Board notes that this direction was in error, as the Office procedures manual provide that, in cases where new evidence is received and a *de novo* decision is to be issued, the date of computation by the Office, not the date of examination by the physician, determines which edition of the A.M.A., *Guides* should be used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record, Reaching a Determination*, Chapter 2.1601.8(c) (October 1992).

vacated the July 20, 2001 decision and remanded the case for the Office to obtain a supplemental report from Dr. Dennis, based on the fourth edition of the A.M.A., *Guides*.

In a report dated March 24, 2002, Dr. Dennis applied the fourth edition of the A.M.A., *Guides* to the results obtained during his June 11, 2001 physical examination, and concluded that appellant had a six percent permanent impairment of his left lower extremity.

In a decision dated April 16, 2002, the Office found that appellant was not entitled to any increased schedule award over the 13 percent previously awarded.

Following a review of the written record, conducted at appellant's request, in a decision dated February 20, 2003, an Office hearing representative affirmed the Office's April 16, 2002 determination that appellant was not entitled to an increased schedule award.

The Board finds that this case is not in posture for decision.

The schedule award provisions of the Federal Employees' Compensation Act<sup>4</sup> and its implementing regulation<sup>5</sup> set forth the number of weeks of compensation to be paid for permanent loss, or loss of use, of body members listed in the schedule. The Act, however, does not specify the manner in which the percentage of loss of a member shall be determined. The method for making such a determination rests in the sound discretion of the Office.<sup>6</sup> The Office has adopted and the Board has approved, the use of the A.M.A., *Guides*,<sup>7</sup> as an appropriate standard for evaluating schedule losses.

The hearing representative found that, as both Dr. Weiss and the Office medical adviser, who created the original conflict in medical opinion, had based their calculations of impairment on the fourth edition of the A.M.A., *Guides*, Dr. Dennis, the impartial medical examiner should be directed to recalculate his impairment ratings also using the fourth edition of the A.M.A., *Guides*.<sup>8</sup> The hearing representative also noted that the Office had erred in allowing Dr. Dennis' findings to be reviewed by the same Office medical adviser who had formed the conflict with Dr. Weiss. Therefore, the Office hearing representative vacated the July 20, 2001 decision and remanded the case for the Office to obtain a supplemental report from Dr. Dennis, based on the fourth edition of the A.M.A., *Guides*.

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> *Danniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

<sup>7</sup> *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>8</sup> The Board notes that this direction was in error, as the Office procedures manual provides that, in cases where new evidence is received and a *de novo* decision is to be issued, the date of computation by the Office, not the date of examination by the physician, determines which edition of the A.M.A., *Guides* should be used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record, Reaching a Determination*, Chapter 2.1601.8(c) (October 1992).

The Board notes that the Office procedure manual provides that, in calculating a schedule award, if new evidence is received and a *de novo* decision is to be issued, the award should be calculated on the basis of the edition of the A.M.A., *Guides* currently used.<sup>9</sup> As the fifth edition of the A.M.A., *Guides* became effective on February 1, 2001, on remand the Office should recalculate appellant's award pursuant to the fifth edition of the A.M.A., *Guides*.<sup>10</sup>

In addition, the Board notes that, in support of his request for an oral hearing, appellant submitted an operative report from Dr. James H. Acker indicating that, on January 8, 2002, he underwent left knee arthroscopy with chondral debridement, medial femoral condyle (chondroplasty), and excision of the medial infrapatellar plica. This medical report was received by the Office on December 9, 2002, prior to the issuance of the hearing representative's final decision on February 20, 2003. On remand, the Office should undertake further medical development with respect to appellant's current condition, in light of this recent surgery, to be followed by a *de novo* decision.

The February 20, 2003 and April 16, 2002 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded to the Office for further development consistent with this decision.

Dated, Washington, DC  
July 18, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record, Reaching a Determination*, Chapter 2.1601.8(c) (October 1992).

<sup>10</sup> FECA Bulletin No. 01-05 (issued January 29, 2001).